IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 718

BANGOR PUNTA OPERATIONS, INC. and BANGOR PUNTA CORPORATION,

Petitioners,

v.

BANGOR & AROOSTOOK RAILROAD COMPANY and BANGOR INVESTMENT COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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April 11, 1974.

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This brief is submitted by Petitioners Bangor Punta Operations, Inc. and Bangor Punta Corporation in reply to the brief of the Respondents Bangor & Aroostook Railroad Company and Bangor Investment Company.

I. Respondents Have Abandoned the First Circuit's Rationale and Now Premise Their Right to Sue on an Asserted Lack of Judicial Power to Look Behind the Corporate Form.

Candidly conceding that Amoskeag, the 99% owner of respondents, would not have standing to bring the action (Resp. Br. 28-29), respondents rely principally on a contention that a federal court may not look behind the corporate form to the real parties in interest and beneficiaries

of a corporate recovery. Respondents argue that the fact that the corporation is the nominal plaintiff is decisive, in that the law of Maine and decisions of this Court foreclose further inquiry (Resp. Br. 10-13). Respondents also contend that the "injury in fact" test of constitutional standing is subject to the same limitation (Resp. Br. 23-25).

No extended discussion is necessary to deal with the foregoing contention. Both this Court and the Supreme Judicial Court of Maine have consistently upheld their power to look behind the corporate form to the shareholders. See *Anderson* v. *Abbott*, 321 U.S. 349 (1944); *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398 (1960); *Bonnar-Vawter, Inc.* v. *Johnson*, 173 A.2d 141, 145 (Me. 1962), and as pointed out in our main brief (p. 20), this Court has been particularly zealous to do so in cases involving access to the federal courts. That the rule is no different for railroads is demonstrated by this Court's decision in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic Assn.*, 247 U.S. 490 (1918), where in piercing the corporate veil of a railroad, the Court stated the applicable principal:

> "... The courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." (247 U.S. at 501)

The more significant aspect of respondents' contention is that it abandons the rationale that was the basis of the First Circuit's decision. As did the District Court, the First Circuit rejected respondents' contention that it could not look through the corporate form holding—contrary to the rule laid down in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972)—that respondents had standing to sue because they were suing to vindicate a public interest. Respondents now concede the constitutional barrier of *Sierra* and revert to

a contention, rejected by both courts below, which exalts form over substance.

That the lower courts were correct in rejecting the blinders urged upon them is evident. It is precisely to prevent unjust enrichment and like inequities that courts have traditionally pierced the corporate veil. Moreover, to contend, as respondents do, that alleged acts which concededly caused no injury to stockholders, creditors or any other persons having an interest in the corporation nonetheless cause the injury-in-fact necessary to meet the constitutional test of standing is absurd.

II. The Public's Interest in Rail Service Is Not Involved.

Respondents' second contention (Resp. Br. 13-17) is that the public's interest in railroads justifies the present action. While respondents do not specify precisely what public interest allegedly is involved, their citation of various decisions dealing with the public's interest in continued service during railroad reorganizations (Resp. Br. 16-17) and the "present rail crisis in the Northeast and Midwest" (Resp. Br. 16) implies that BAR's financial capacity to provide continued rail service has been impaired by the acts alleged and is involved in the instant action.

No such impairment was alleged in the complaint and nothing could be further from the mark. Far from being in financial straits, BAR is earning profits, paying dividends, and retiring debt. In a letter to shareholders dated October 29, 1973, management declared a $1.00 dividend, stating "the financial health of the company is excellent," and reporting that during the year the company had retired $3,264,100 of debt and made capital improvements of $483,000. The foregoing dividend was the second declared in 1973, management having declared a $1.00 dividend in June in a letter which reported earnings of $1,508,368 and $1,502,354 for 1971 and 1972, respectively. The June letter stated that the dividend had been declared

because of the company's "satisfactory profits and overall financial condition", and that management was "proud of being the only Northeast Carrier with the ability to pay a dividend".*

BAR's solvency and declaration of dividends make untenable respondents' further contention that a decree can be framed which will ensure that a corporate recovery inures to the public benefit. The First Circuit recognized that courts lack power to prevent any but illegal distributions (App. 66). It is evident from BAR's recent payment of dividends that distribution of a corporate recovery to shareholders as a dividend would violate no law.

Moreover, assuming *arguendo* that a court did have the power to issue a decree regulating the use of proceeds, or even that respondents entered into a stipulation with regard thereto (Resp. Br. 30), there would still be no assurance of public benefit. Cash is fungible. A decree or stipulation requiring that any recovery be invested in plant or equipment would only free other corporate funds for dividends which otherwise would be required for such purposes.

The fact is that the only way a benefit to the public could be assured would be for the court to maintain for the indefinite future the kind of supervision of BAR exercised over corporations in receivership. It is submitted that the courts should not assume such a role with regard to a solvent corporation.

The various cases cited by respondents (Resp. Br. 13-18) have no relevance to the instant case. Colorful dicta aside, the cases hold nothing more dramatic than that railroads are subject to regulation,** that they owe certain specific

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* BAR's letters to shareholders dated June 28, 1973 and October 29, 1973 are set out in Appendix A to this brief.

** *Railroad Commissioners* v. *Portland and O.C. R.R.* (Resp. Br. 16).

duties to the public in laying track,* that when in receivership or reorganization the public interest in continued service is an interest to be considered by the receiver or trustee,** and that former section 15(a) of the Interstate Commerce Act, *which section has been repealed,* was constitutional***. None of these propositions is involved in this action.

III. No Present Congressional Policy Towards Railroads Is Involved. If an Additional Remedy Is to Be Created, It Should Be Done by Congress.

Both respondents and the Interstate Commerce Commission concede that notwithstanding the consistent Congressional attention given to railroads over the past fifty years and the pervasive statutory scheme enacted to protect what Congress deemed to be the public interest in railroads, no part of that legislative and regulatory scheme is involved in the present action. Respondents assert that the "policy" established by the Transportation Acts of 1920 and 1940 has been violated, but cite no provision (Resp. Br. 18). The Commission admits that the intercorporate dealings at issue herein fall within what it terms a "present gap" in the statutory scheme, which it is seeking to remedy by two bills presently pending before both Houses of Congress (Amicus Br. pp. 6-7).

The "gap" in the statute coupled with the pendency of bills before Congress militates strongly against the judicial creation of remedies effected by the First Circuit's decision. As pointed out in our main brief (pp. 15-16), federal courts have consistently deferred to Congress' regulatory scheme and have refused to judicially create remedies which Congress has not provided. Thus even in the

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* *Woodstock Iron Company* v. *Richmond and D. Extension Co.* (Resp. Br. 14).

** *Barton* v. *Barbour; Union Trust Co. of New York* v. *Illinois Midland Ry Co.; New Haven Inclusion Cases* (Br. 13, 14, 15).

*** *Dayton-Goose Creek R.R. Co.* v. *U.S.* (Resp. Br. 18).

absence of pending legislation, the First Circuit's creation of a new remedy would be improper. Here, where Congress is considering legislation and has not yet acted, although the matter was first called to its attention four years ago (Amicus Br. p. 6), the case against judicial intervention is even stronger.

The body of law regulating and governing railroads is intricate and detailed, involving delicate adjustments of various competing interests. As demonstrated by the frequent amendment of the Interstate Commerce Act and most recently by the passage of the "Amtrak Act", 45 U.S.C. § 501 *et. seq.*, Congress has shown willingness to amend existing statutes and enact new legislation where it deems the public interest requires it. If, as the Commission suggests, a gap in Congress' statutory scheme exists, it is for Congress and Congress alone to so determine and create a remedy.*

IV. Reversal Of The First Circuit's Decision Will Abridge No Substantive Right Recognized by Maine Law.

Respondents' final contention (Resp. Br., Point III B) is that this Court may not reverse the First Circuit's decision because dismissal of the action assertedly would abridge substantive rights protected by Maine law.

The flaw in this argument is that the action could not be maintained under Maine law. It is true that in *Forbes* v.

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* In considering the appropriateness of the First Circuit's decision, it should also be noted that even if Congress enacted the legislation before it, the transactions at issue herein would be beyond Congress' definition of the boundaries of the public's interest in railroads. The pending bills would empower the Commission to forbid any intercorporate transaction it found "is impairing or threatens to impair the ability of the affected carrier to properly perform its service to the public" (H.R. 11092, 93d Cong., 1st Sess. § 5). As pointed out in Point III, *supra*, no allegation is made that the transactions alleged by respondents impaired or threatened to impair BAR's ability to properly provide service.

Wells Beach Casino, Inc., 307 A.2d 210 (Me. 1973), the Supreme Judicial Court held that non-contemporaneous stock ownership is not an absolute bar to a derivative suit in the exceptional case where both the corporation and the non-contemporaneous share owner have suffered separate and distinct injuries from the alleged acts of corporate waste. In that case, however, the Supreme Judicial Court specifically reaffirmed its earlier holding in *Hyams* v. *Old Dominion Company*, 113 Me. 294, 93 A. 747 (1915) that a stockholder whose vendor participated or acquiesced in the wrong for which recovery is sought would be barred from bringing suit. Since Amoskeag's vendor was Bangor Punta, Maine law would thus bar it from instituting this action as absolutely as Federal Rule of Civil Procedure 23.1. Moreover, Maine has now by statute adopted the contemporaneous ownership rule (App. 34), and thus at the present time is in complete harmony with the federal rules.

Respondents apparently do not seriously press this contention, since under the same subheading (Resp. Br. 28-29) they assert that dismissal of the instant action would be of no effect because assertedly the less than 1% minority who are contemporaneous stockholders could cause the railroad to bring the action and recover the full amount claimed. Again respondents are in error. The rule, as set forth in Fletcher, *Cyclopedia of Corporations*, is that while pro-rata recovery is not ordinarily decreed, one of the circumstances in which pro-rata recovery is appropriate is where, as here, "the shares of the defendants are sold to outsiders who would then get an undeserved windfall if recovery is ordered to the corporation", 13 Fletcher, *Cyc. Corp.*, (perm. ed., 1963 rev.) Sec. 6028. See also *Perlman* v. *Feldman*, 219 F.2d 173 (2d Cir. 1955); *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 100 A. 645 (1917); *Joyce* v. *Congdon*, 114 Wash. 239, 195 P.29 (1921). In any case the issue is irrelevant to the present action, which is not brought by the less than 1% minority, and does not affect their rights.

V. Remand To The First Circuit For Further Argument Is Inappropriate.

Sensing the weakness of their contentions and the First Circuit's opinion, respondents suggest in their conclusion (Resp. Br. 32) that the Court remand the case to the First Circuit for a determination whether the *Home Fire* rule is applicable to claims under the federal antitrust and securities laws.

The suggested remand is unnecessary because it is not necessary to invoke *Home Fire* to bar the federal claims. Respondents cite no statutory provision permitting suit under the antitrust or securities laws by uninjured parties, and this Court has held that in the absence of such a statutory provision, an action by an uninjured party may not constitutionally be maintained in the federal courts. *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). Moreover, as the District Court noted (App. 33), Federal Rule of Civil Procedure 23.1 applies directly to the federal claims.

Conclusion

The order of the Court of Appeals for the First Circuit should be reversed, and the order of the District Court for the District of Maine reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

BANGOR AND AROOSTOOK RAILROAD COMPANY
R.F.D. No. 2, Box 14
Bangor, Maine 04401

June 28, 1973

To the Stockholders:

It is a pleasure to enclose a dividend check in the amount of $1.00 for each share of Bangor and Aroostook Railroad Company common stock that you hold. This dividend, payable June 28, 1973, was declared by your Board of Directors on June 11, 1973. The company's last dividend was paid on December 29, 1967, and amounted to 20¢ per share.

This dividend has been declared because of satisfactory profits and over-all financial condition of the Bangor and Aroostook Railroad Company. Future dividends will be declared and paid only after careful examination of conditions then in existence. Earnings of $1,508,368 and $1,502,354 were reported for the years 1971 and 1972 respectively. The railroad experienced a small loss in 1968, a profit of $175,487 in 1969 and a loss of $807,647 in 1970. Figures for all years exclude intercompany dividends. The management of this railroad is proud of being the only Northeastern Carrier with the ability to pay a dividend.

During the years 1968 through 1972, the railroad made net additions and betterments to its property of $8,903,813. Series "A" First Mortgage Bonds with a par value of $5,586,000, which would have matured on February 1, 1976, have been retired at a reacquisition cost of $4,543,400. Funds for buying in these bonds were derived from relatively short-term bank loans which must be refinanced on a long-term basis.

Earnings for the first five months of 1973 compared with the same period of 1972 were:

	1973	1972
Operating Revenues	$6,174,481	$6,388,726
Operating Expenses & Taxes ..	7,107,960	6,873,985
Rwy. Operating Income ...	(933,479)	(485,259)
Equipment Rent Income	1,994,937	1,808,485
Other Income (net)	87,751	103,968
Avail. Fixed & Cont. Chgs.	1,149,209	1,427,194
Fixed Charges	616,247	586,269
Income after Fixed Charges ...	532,962	840,925
Prov. Federal Income Tax	—	248,100
Net Ordinary Income*	532,962	592,825

*Excluding intercompany dividends.

Best regards,

ALAN G. DUSTIN
Executive Vice President
For the Board of Directors

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BANGOR AND AROOSTOOK RAILROAD COMPANY
R.F.D. No. 2, Box 14
Bangor, Maine 04401

October 29, 1973

To the Stockholders:

On October 16, 1973, the Board of Directors of your Company declared a dividend of $1.00 for each share of Bangor and Aroostook Railroad Company common stock payable on December 14, 1973, to Stockholders of Record on December 7, 1973, out of prior year retained earnings.

The financial health of your Company is excellent. During the first eight months of 1973, it has made capital improvements of $483,000, retired outstanding debt amounting to $3,269,100 and paid a dividend of $1.00 per share ($179,810) on June 28.

Earnings for the first eight months of 1973 compared with the same period of 1972 were:

	1973	1972
Operating Revenues	$ 9,417,353	$ 9,186,214
Operating Expenses & Taxes ..	11,213,676	10,663,142
Rwy. Operating Income ...	(1,796,323)	(1,476,928)
Equipment Rent Income	3,097,096	3,055,841
Other Income (net)	153,388	128,912
Avail. Fixed & Cont. Chgs.	1,454,161	1,707,825
Fixed Charges	980,956	952,542
Income after Fixed Charges ...	473,205	755,283
Prov. Federal Income Tax	—	19,600
Net Ordinary Income*	473,205	735,683

*Excluding intercompany dividends.

Best regards,

WALTER E. TRAVIS
Executive Vice President
For the Board of Directors

APPENDIX B

H. R. 11092 is identical to its companion bill, S. 2460, introduced by Senators Magnuson and Cotton and referred to the Committee on Commerce. Only those portions relevant to rail carriers have been printed in this Appendix.

93D CONGRESS
1ST SESSION

H. R. 11092

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 24, 1973

Mr. STAGGERS (for himself and Mr. DEVINE) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend the Interstate Commerce Act, to grant additional authority to the Interstate Commerce Commission regarding conglomerate holding companies involving carriers subject to the jurisdiction of the Commission and noncarriers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. 5(2)(a)) is amended by striking out the period at the end of subparagraph (ii) and inserting in lieu thereof "; or" and by adding at the end thereof the following new subparagraph:

"(iii) for any person which is not a carrier, or two

or more such persons jointly, to acquire control through ownership of its stock or otherwise of a carrier by railroad, the operating revenues of which exceeded $5,000,000 or of a carrier other than a carrier by railroad, the operating revenues of which exceeded $1,000,000 for a period of twelve consecutive months preceding the date of the agreement of the parties covering the transaction."

SEC. 2. The first and second sentences of section 5(3) of the Interstate Commerce Act (49 U.S.C. 5(3)) are amended to read as follows: "Whenever a person which is not a carrier is authorized by an order entered under paragraph (2), to acquire control, or whenever a person which is not a carrier is found by the Commission to be in control of any carrier by railroad, the operating revenues of which exceeds $5,000,000 or of a carrier other than a carrier by railroad, the operating revenues of which exceed $1,000,000 annually, or of two or more carriers, such person thereafter shall, to the extent provided by order of the Commission be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: section 20 (1) to (10), inclusive, of this part, sections 204(a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and

section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. To the extent, if any, and at such time as the Commission orders the application of such provisions of section 20a of this part or section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for (a) if it finds that such issue or assumption is for a purpose unrelated to the activities of any carrier under the control of such person, subject, however, to concurrent jurisdiction to be exercised by the Securities and Exchange Commission, or (b) if it finds that such issue or assumtpion is (i) for a purpose related to the activities of any carrier under the control of such person, (ii) is consistent with the proper performance of service to the public by each carrier under the control of such person, and (iii) will not impair the ability of any such carrier to perform such service."

SEC. 3. Section 5(3) of the Interstate Commerce Act (49 U.S.C. 5(3)) is amended by inserting "(a)" immediately after "(3)" and by adding at the end thereof the following new subparagraph:

"(b) Whenever in the performance of its duties under section 12, section 20, and section 204(a)(7) of this Act to

inquire into the management of the business of any carrier by railroad, the operating revenues of which exceed $5,000,000 annually, or a carrier other than a carrier by railroad the operating revenues of which exceed $1,000,000 annually, the Commission determines as a result of such inquiry that there is reason to believe that dealings or transactions involving the receipt and expenditures of moneys, transfers of land and buildings, or equipment, or other dealings (other than those involving issuances of securities as provided in section 20a of part I or section 214 of part II) between any such carrier and any person controlling, controlled by, or under common control with such carrier, or any affiliate of such person, may result in impairment of the operations of the carrier or its ability to respond to the needs of the public, the Commission may issue an order to any such carrier to show cause why all such dealings and transactions should not be submitted to the Commission for approval or disapproval. The Commission may, after hearing, require by order any such carrier to file an application for approval of any dealings or transactions aforesaid until further order by the Commission, or require by order such other action, including divestiture of control, as contemplated by section 5(17) of this Act."

SEC. 4. Section 5(4) of the Interstate Commerce Act (49 U.S.C. 5(4)) is amended to read as follows:

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transactions within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management of a carrier or of two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management. For the purpose of this section, any person owning beneficially 10 per centum or more of the voting securities of a carrier shall be presumed to be in control of such carrier unless the Commission finds otherwise."

SEC. 5. Section 5 of the Interstate Commerce Act (49 U.S.C. 5) is amended by adding at the end thereof the following new paragraph:

"(17) Whenever the Commission, after notice and hearing, determines that control—of a carrier by another carrier or two or more carriers, or by a person which is not

a carrier, or two or more persons—is being used in a manner which is impairing or threatens to impair the ability of the affected carrier properly to perform its service to the public, it shall by order direct cessation of any actions or practices of the controlling party or parties and direct such affirmative conduct as in its judgment will enable any such carrier properly to perform its service to the public, or, where warranted by the facts and circumstances, the Commission shall require such further action as in its opinion is necessary or appropriate, including, among other things, the divestiture of control of the carrier whose service to the public has been impaired or threatened."

SEC. 6. Section 20(5)) of the Interstate Commerce Act (49 U.S.C. 20(5)) is amended by inserting "(a)" immediately after "(5)" and by adding at the end thereof the following new subparagraph:

"(b) Any person having legal or beneficial ownership, as trustee or otherwise, of more than 1 per centum of any class of the capital stock or capital, as the case may be, of any carrier by railroad, the operating revenues of which exceed $5,000,000 annually or 5 per centum of any class of the capital stock or capital, as the case may be, of any carrier other than a carrier by railroad the operating revenues of which exceed $1,000,000 annually, shall submit at such times and in such form as the Commission may require a

description of the shares of stock or other interest owned by such person, and the amount thereof."

SEC. 7. Section 20(1) of the Interstate Commerce Act (49 U.S.C. 20(1)) is amended to read as follows:

"(1) The Commission is hereby authorized to require annual, periodical, or special reports from carriers, persons controlling, controlled by or under a common control with such carriers, lessors, and associations (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, persons controlling, controlled by or under a common control with such carriers, lessors, and associations specific and full, true and correct answers to all questions upon which the Commission may deem information to be necessary, classifying such carriers, persons controlling, controlled by, or under a common control with such carriers, lessors, and associations as it may deem proper for any of these purposes. Such annual reports shall give an account of the affairs of the carrier, persons controlling, controlled by, or under common control with such carrier, lessor, or association in such form and details as may be prescribed by the Commission."

SEC. 8. Section 20(3) of the Interstate Commerce Act (49 U.S.C. 20(3)) is amended to read as follows:

"(3) The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes

of this part, prescribe a uniform system of accounts applicable to any class of carriers subject thereto, persons controlling, controlled by or under common control with such carriers, and a period of time within which such class shall have such uniform system of accounts, and the manner in which such accounts shall be kept."

SEC. 9. Section 20(5)(a) of the Interstate Commerce Act (49 U.S.C. 20(5)(a)) as so redesignated by section 6 of this Act, is amended to read as follows:

"(5)(a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers, persons controlling, controlled by, or under common control with such carriers, and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as the receipts and expenditures of moneys, and it shall be unlawful for such carriers, persons controlling, controlled by, or under common control with such carriers, or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, persons controlling, controlled by, or under common control with any

such carriers, lessors, and associations. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to all lands, buildings, or equipment of such carriers, persons controlling, controlled by, or under common control with such carriers, or lessors, and shall have authority under its order to inspect and examine any and all such lands, buildings, and equipment. Such carriers, persons controlling, controlled by, or under common control with such carriers, lessors, and other persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and such carriers, persons controlling, controlled by, or under common control with such carriers, and lessors shall submit their lands, buildings, and equipment to inspection and examination, to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials."

SEC. 10. Section 20a(3) of the Interstate Commerce Act (49 U.S.C. 20a(3)) is amended by striking out the period at the end thereof and inserting the following: ": *Provided, however,* That in the case of a person considered a carrier pursuant to section 5(3) of this part, modifications, terms, or conditions may be specified only after a

finding by the Commission that, otherwise, the proposed issue or assumption of securities would not be consistent with the proper performance of service to the public by each carrier which is under the control of such person and would impair the ability of any such carrier to perform such service in the absence of such modification, terms, or conditions.''.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BANGOR PUNTA OPERATIONS, INC., ET AL. *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 73-718. Argued April 15, 1974—Decided June 19, 1974

In 1964 petitioner Bangor Punta Corp. (Bangor Punta), through its wholly-owned subsidiary, acquired 98.3% of the outstanding stock of respondent Bangor & Aroostook Railroad Co. (BAR), a Maine railroad, by purchasing all the assets of BAR's holding company, Bangor & Aroostook Corp. (B & A). From 1964 to 1969 Bangor Punta controlled and directed BAR. In 1969 Bangor Punta, again through its subsidiary, sold all its BAR stock to Amoskeag Co., which then assumed responsibility for BAR's management and later acquired additional shares to give it 99% ownership of the outstanding stock. In 1971, BAR and its subsidiary filed an action against Bangor Punta and its subsidiary, alleging various acts of corporate mismanagement of BAR during the period of control from 1960 through 1967 by Bangor Punta and B & A, and seeking damages for violations of the federal antitrust and securities laws, the Maine Public Utilities Act, and the common law of Maine. The District Court first noted that Amoskeag, the owner of more than 99% of the BAR shares, would be the principal beneficiary of any recovery, was thus the real party in interest, and that since Amoskeag had acquired its BAR stock long after the alleged wrongs had occurred, any recovery by it would be a windfall. The District Court then dismissed the action on the ground that since Amoskeag would have been barred from maintaining a shareholder derivative action due to its failure to satisfy the "contemporaneous ownership" requirement of both Fed. Rule Civ. Proc. 23.1 (b)(1), and state law, equitable principles precluded the use of the corporate fiction to evade that requirement. The Court of Appeals reversed primarily on the ground that in view of BAR's status as a "public" or "quasi

public" corporation and the important nature of the services it provides, any recovery by BAR would also inure to the public's benefit, a factor the court found to be sufficient to support a corporate cause of action and to render any windfall to Amoskeag irrelevant. *Held:*

1. The equitable principles that a stockholder, who has purchased all or substantially all the shares of a corporation from a vendor at a fair price, may not seek to have the corporation recover against that vendor for prior corporate mismanagement, and that the corporate entity may be disregarded if equity so demands, preclude respondent corporations from maintaining the action under either the federal antitrust and securities laws or state law. Pp. 6–10.

(a) Amoskeag, having purchased 98.3% of the stock of BAR from Bangor Punta and alleging no fraud, has no standing in equity to maintain this action for alleged corporate mismanagement. *Home Fire Insurance Co.* v. *Barber*, 67 Neb. 644, 93 N. W. 1024. Pp. 7–8, 9–10.

(b) As the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, Amoskeag cannot avoid the command of equity through the guise of proceeding in the name of respondent corporations which it owns and controls. Pp. 8–9, 10.

2. The Court of Appeals' assumption that any recovery would necessarily benefit the public is unwarranted and also overlooks the fact that Amoskeag, the actual beneficiary of any recovery, would be unjustly enriched since it has sustained no injury. Neither the federal antitrust and securities laws nor the applicable state laws contemplate a windfall recovery by Amoskeag in these circumstances. Pp. 10–12.

3. Deterrence of railroad mismanagement is not in itself a sufficient ground for allowing respondents to recover. If such deterrence were the only objective, it would suffice if any plaintiff was willing to file a complaint, and no injury or violation of a legal duty to the particular plaintiff would have to be alleged. Pp. 12–13.

482 F. 2d 865, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., delivered a dissenting opinion, in which DOUGLAS, BRENNAN, and WHITE, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 73-718

Bangor Punta Operations, Inc., et al., Petitioners, *v.* Bangor & Aroostook Railroad Company et al.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[June 19, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves an action by a Maine railroad corporation seeking damages from its former owners for violations of federal antitrust and securities laws, applicable state statutes, and common-law principles. The complaint alleged that the former owners had engaged in various acts of corporate waste and mismanagement during the period of their control. The shareholder presently in control of the railroad acquired 98.3% of the railroad's shares from the former owners long after the alleged wrongs occured. We must decide whether equitable principles applicable under federal and state law preclude recovery by the railroad in these circumstances.

I

Respondent Bangor and Aroostook Railroad Company (BAR), a Maine corporation, operates a railroad in the northern part of the State of Maine. Respondent Bangor Investment Company (BIC), also a Maine corporation, is a wholly-owned subsidiary a BAR. Petitioner Bangor Punta Corporation (Bangor Punta), a Delaware corporation, is a diversified investment com-

pany with business operations in several areas. Petitioner Bangor Punta Operations, Inc. (BPO), a New York corporation, is a wholly-owned subsidiary of Bangor Punta.

On October 13, 1964, Bangor Punta, through its subsidiary BPO, acquired 98.3% of the outstanding stock of BAR. This was accomplished by the subsidiary's purchase of all the assets of Bangor and Aroostook Corporation (B&A), a Maine corporation established in 1960 as the holding company of BAR. From 1964 to 1969, Bangor Punta controlled and directed BAR through its ownership of about 98.3% of the outstanding stock. On October 2, 1969, Bangor Punta, again through its subsidiary, sold all of its stock for $5,000,000 to Amoskeag Company, a Delaware investment corporation. Amoskeag assumed responsibility for the management of BAR and later acquired additional shares to give it ownership of more than 99% of all the outstanding stock.

In 1971, BAR and its subsidiary filed the present action against Bangor Punta and its subsidiary in the United States District Court for the Northern District of Maine. The complaint specified 13 counts of alleged mismanagement, misappropriation, and waste of BAR's corporate assets occurring during the period from 1960 through 1967 when B&A and then Bangor Punta controlled BAR.[1] Damages were sought in the amount of $7,000,000 for violations of both federal and state laws.

[1] Several of the alleged acts of corporate mismanagement occurred between 1960 and 1964 when B&A, BAR's holding company, was in control of the railroad. Liability for these acts was nevertheless sought to be imposed on Bangor Punta, even though it had no interest in either BAR or B&A during this period. The apparent basis for liability was the 1964 purchase agreement between B&A and Bangor Punta. The complaint in the instant case alleged that under the agreement Bangor Punta, through its subsidiary, assumed "all debts, obligations, contracts and liabilities" of B&A.

The federal statutes alleged to have been violated included § 10 of the Clayton Act, 15 U. S. C. § 20, § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and Rule 10b–5, 7 CFR § 240.10b–5, as promulgated thereunder by the Securities and Exchange Commission. The state claims were ground on § 104 of the Maine Public Utilities Act, 35 M. R. S. A. § 104, and the common law of Maine.

The complaint focused on four intercompany transactions which allegedly resulted in injury to BAR.[2] Counts I and II averred the B&A, and later Bangor Punta, overcharged BAR for various legal, accounting, printing and other services. Counts III, IV, V, and VI averred that B&A improperly acquired the stock of the St. Croix Paper Company which BAR owned through its subsidiary. Counts VII, VIII, IX, and X charged that B&A and Bangor Punta improperly caused BAR to declare special dividends to its stockholders, including B&A and Bangor Punta, and also caused BAR's subsidiary to borrow in order to pay regular dividends. Counts XI, XII, and XIII charged that B&A improperly caused BAR to excuse payment by B&A and Bangor Punta of the interest due on a loan made by BAR to B&A. In sum, the complaint alleged that during the period of their control of BAR, Bangor Punta, and its predecessor in interest B&A, "exploited it solely for their own purposes" and "calculatedly drained the reserves of BAR in violation of the law for their own benefit."

The District Court granted petitioners' motion for summary judgment and dismissed the action. 353 F. Supp. 724 (1972). The court first observed that although the suit purported to be primary action

[2] Bangor Punta was alleged to have effected these transactions through its wholly-owned subsidiary BPO. For purposes of clarity, we shall attribute BPO's actions directly to Bangor Punta.